

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA . CRIMINAL NO. 15-10127-MLW
V. . BOSTON, MASSACHUSETTS
. AUGUST 19, 2015
TIMOTHY R. FLAHERTY .
Defendant .
.

TRANSCRIPT OF MOTION HEARING
AND INTERIM STATUS CONFERENCE
BEFORE THE HONORABLE DONALD L. CABELL
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE
Robert A. Fisher, Esq.
S. Theodore Merritt, Esq.
United States Attorney's Office
One Courthouse Way, Suite 9200
Boston, MA 02210
617-748-3612
Robert.Fisher2@usdoj.gov
Theodore.merritt@usdoj.gov

MARTIN G. WEINBERG, PC
Martin G. Weinberg, Esq.
20 Park Plaza, Ste. 1000
Boston, MA 02116
617-227-3700
owlmcb@att.net

BUTTERS BRAZILIAN LLP
Thomas J Butters, Esq.
One Exeter Plaza
699 Boylston St., 12th Floor
Boston, MA 02116
617-367-2600
butters@butterbrazilian.com

Court Reporter:

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MARYANN V. YOUNG
Certified Court Transcriber
Wrentham, MA 02093
(508) 384-2003

1 (Court called into session)

2 (10:13:19)

3 THE CLERK: The case of the United States v.
4 Timothy Flaherty, Criminal Action No. 15-10127 will now be
5 heard before the Court. Counsel please identify
6 themselves for the record.

7 MR. FISHER: Good morning, Your Honor, Robert
8 Fisher, Ted Merritt for the United States.

9 THE COURT: Good morning.

10 MR. MERRITT: Good morning, Your Honor.

11 MR. WEINBERG: Good morning, Your Honor, Martin
12 Weinberg along with Tom Butters and Matthew Thompson on
13 behalf of Timothy Flaherty who is present in Court.

14 THE COURT: Okay, and good morning to you. All
15 right. So we're here for a few different reasons. We're
16 here for a status conference and there are also a number
17 of pending motions, and if you don't mind I want to start
18 at the end and then work our way back because just
19 logistics wise, I'm going to be in and out but for the
20 most part not very accessible for the next two weeks and
21 I'll be back the first full week of September. And so
22 contemplating that our timing on resolving some of these
23 issues may not be complete until early September, I was
24 going to propose bringing you back for a status conference
25 at the end of September and for the moment not calling it

1 a final or an interim but figuring we can figure out
2 whether it's a final or an interim as we get closer to
3 that time. But if that's right, if that's okay with you,
4 I wanted to get that date and time now and then that helps
5 us to kind of cabin everything else in. So, first of all,
6 are you all amenable to coming back to another conference
7 around the end of September as opposed to before then or
8 later than--

9 MR. WEINBERG: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. FISHER: The government is, Your Honor.

12 THE COURT: All right. So let me get something
13 for that last week.

14 THE CLERK: How about September 29th at 11
15 o'clock?

16 THE COURT: I think Mr. Merritt doesn't have his
17 glasses on so it's hard for him to, okay.

18 MR. MERRITT: It's good.

19 THE COURT: Okay. All right, so that'll be
20 September 29th.

21 THE CLERK: Yup, at 11.

22 THE COURT: All right, so now with respect to
23 the motions and the status of the case, I just want to get
24 a better idea on discovery and the way I'm trying to think
25 about this and so you can just help me understand, is if

1 you divide it into *Fowler* type stuff and non-*Fowler* type
2 stuff, with respect to the non-*Fowler* requests, how much
3 is still in dispute and how much discovery are we talking
4 about there?

5 MR. FISHER: Yeah, I think there's very little
6 on the side of *Fowler*--

7 THE COURT: Okay, so there's very, okay.

8 MR. FISHER: --but I think it depends on how you
9 categorize some of the, although I, we categorize them in
10 the *Fowler* arena.

11 THE COURT: Okay.

12 MR. FISHER: The DOJ facts and, and whatnot.

13 THE COURT: As do I. I put all of that in there
14 too.

15 MR. FISHER: So--

16 THE COURT: So is everything, is that really--

17 MR. FISHER: Pretty much everything else--

18 THE COURT: --that's really the issue.

19 MR. FISHER: --cause there, I think there may be
20 one or two. I, one or two items I promised them. One I
21 think they already have--

22 THE COURT: Okay.

23 MR. FISHER: --which would be an FBI memo that
24 went down to Washington. I'm, I'm pretty sure that was
25 already produced. There's one other, there was also a fax

1 that they wanted the headers on,--

2 THE COURT: Um-hmmm.

3 MR. FISHER: --and I have to sit down with the
4 trooper. He would have the answer to that and because of
5 summer schedule haven't sat down with him.

6 THE COURT: All right, so it's possible those
7 may not be disputed in terms of whether you're going to--

8 MR. FISHER: Oh, it's already been turned over
9 and I agreed that I would, they have, they weren't sure
10 what the numbers were in the header.

11 THE COURT: Okay.

12 MR. FISHER: Yeah, I'm not sure either. I think
13 either the CPAC Unit or the DA's office so I was going to
14 investigate that.

15 THE COURT: All right, so in terms of things
16 that are being disputed though, it's all related to what
17 I'm calling kind of the *Fowler* stuff. Is that right?

18 MR. FISHER: That, I think that's fair to say.

19 THE COURT: All right. Okay.

20 MR. WEINBERG: I, I should just, you know, and I
21 think Mr. Fisher accurately stated it depends on the
22 elasticity of the *Fowler* ambit?

23 THE COURT: Yeah.

24 MR. WEINBERG: We believe that particularly
25 given the most recent disclosures of the government's

1 position regarding *Fowler* and regarding the genesis of
2 December 23, 24 communications--

3 THE COURT: Right.

4 MR. WEINBERG: --we're going to put that within
5 *Fowler*, save that for argument on *Fowler* because if
6 December 23-4 is perceived by Your Honor as being outside
7 *Fowler*, then we have certain discovery requests that
8 relate to the governments most recent filing. In other
9 words, we have a memo from the government, we have an
10 affidavit from Wyshak--

11 THE COURT: Yeah, right.

12 MR. WEINBERG: --respectfully they're relatively
13 un-particularized to the extent of the statements in a
14 memo that talk about conversations with a sergeant.

15 THE COURT: Um-hmmm.

16 MR. WEINBERG: We have no notes, no documents,
17 no
18 reports. We have an affidavit from Mr. Wyshak which
19 suggests at least that someone else in his unit, which I
20 would proffer is likely to be Mr. Fisher--

21 THE COURT: Um-hmmm.

22 MR. WEINBERG: --is the person that had the
23 communications that have some legal significance. We
24 don't have anything from the Middlesex District Attorney.
25 We don't have anything regarding the December 23 from

1 Sergeant Bullman--

2 THE COURT: Um-hmmm.

3 MR. WEINBERG: --and I, I'd ask I think a
4 subsidiary to the *Fowler* argument is the extent to which
5 the Middlesex DA and the Mass state police oversee as
6 being part of the quote "prosecution team" for *Brady*
7 purposes, and if so when did they become part of the
8 prosecution team, and whether or not the government is
9 assuming the obligations and review those files and give
10 us *Brady* to the extent that's included or whether instead
11 we have to come back the Court, make a Rule 17 subpoena
12 request to at least start the process of getting another
13 sovereign to produce documents that we think are essential
14 to the litigation of the federal case.

15 THE COURT: Okay, and not that I want to jump
16 into it sideways like this but what, give me an example
17 just so I can think about that conceptually. What would
18 be in your mind would be something that would be
19 exculpatory in the possession of say either the trooper or
20 the Middlesex DA's office for purposes of the federal
21 prosecution?

22 MR. WEINBERG: Two, two categories. One, it's
23 our respectful claim that there was no civil rights
24 investigation occurring on December 23 and 24 that could
25 conceivably exempt the pivotal conversation on the 24th

1 from the requirements of *Fowler* so that if Bullman,
2 Sergeant Bullman is calling the PCU or Mr. Fisher on the
3 23rd and saying, we have Tim Flaherty offering a state
4 victim money--

5 THE COURT: Um-hmmm.

6 MR. WEINBERG: --and that was what was
7 memorialized and that became the driving force, then that
8 is exculpatory to the extent of the requirement of
9 1512(b)(3) where there needs to be a passable federal
10 crime. You can assume the worst about Mr. Flaherty's
11 conduct--

12 THE COURT: Um-hmmm.

13 MR. WEINBERG: --regarding the state informant
14 if all he was doing which we contend all he was doing is
15 discouraging him from going to a state criminal proceeding
16 or talking to a state prosecutor, that is not a federal
17 crime. It only because conceivably--

18 THE COURT: Right.

19 MR. WEINBERG: --a federal issue if at the time
20 there was a viable federal civil rights investigation
21 which as Your Honor knows if wasn't so serious to Mr.
22 Flaherty with the idea of a fender bender in Central
23 Square being one of the 58 cases nationally in the context
24 of, you know, murderers and police brutality and prison
25 guard brutality and church burnings for them to really

1 make the case that we are conducting a serious federal
2 civil rights investigation of Ralph Feinberg over a single
3 sentence--

4 THE COURT: Right.

5 MR. WEINBERG: --without corroboration resulting
6 in no physical injury is just so implausible that we have
7 a right to be skeptical that this was something other than
8 an attempt to federalize a witness tampering in the state
9 court that was, that was quintessentially a state offense,
10 if an offense at all.

11 THE COURT: All right.

12 MR. WEINBERG: And so anything that can form--

13 THE COURT: Okay.

14 MR. WEINBERG: --that confirm--

15 THE COURT: All right.

16 MR. WEINBERG: --this was state not federal,
17 this was tampering, not civil rights is exculpatory under
18 1512, and under one of our principal defenses.

19 THE COURT: All right, so in essence you're
20 already starting. So let me, you know, I guess we can
21 just continue it and just kind of formalize it because you
22 know, I've read your memo. I've read the government's and
23 I still come back to something that I had voiced earlier
24 on which is I'm still grappling with or I guess I'm still
25 not convinced that *Fowler* applies to this case. I see

1 *Fowler*. I see Justice Breyer there as having tried to
2 reconcile two parts of the statute that were somewhat at
3 odds with each other and in that context applying to the
4 situation where it's almost, it's a hypo. It's not clear
5 who the communication would have been made to and for
6 exactly what purpose whereas here everything is clear. We
7 know who all the actors were. We know what the
8 communication was. We know to whom the, to whom it was
9 made or to be made and so again, I read it again last
10 night. I'm, so help me, help me--

11 MR. WEINBERG: Sure.

12 THE COURT: --on that.

13 MR. WEINBERG: Let, let's, so let, let me first-
14 -

15 THE COURT: And before you do that, so one thing
16 that I wanted to ask you. If we were to determine, and
17 that's an if cause we're still working through it, but if
18 we were to find that *Fowler* doesn't apply--

19 MR. WEINBERG: Yes.

20 THE COURT: --how much of your motion, motions
21 go away or alternatively, do you have other grounds that
22 would justify you asking and collecting all of the stuff
23 you were asking for?

24 MR. WEINBERG: Well, well the other grounds
25 would be, again I would back up and say it relates to

1 *Fowler* but even if the Court was to make a legal finding
2 that *Fowler* isn't applicable to both--

3 THE COURT: Um hmmm.

4 MR. WEINBERG: --December 23-4 and to the May
5 conversations as opposed to only one subset of the
6 evidence here, it would still be the issue of whether or
7 not the, the election of a federal civil rights
8 investigation was selectively focused on Mr. Flaherty and
9 not on Mr. Feinberg.

10 THE COURT: But as the government says and isn't
11 that really kind of an offshoot of the--

12 MR. WEINBERG: It is.

13 THE COURT: --outrageous government conduct type
14 of doctrine and I mean it's there--

15 MR. WEINBERG: Yes, but--

16 THE COURT: --it's within their province to
17 sometimes go after people they want to go after.

18 MR. WEINBERG: It's not their province to, to,
19 to federalize a state offense to avoid the Department of
20 Justice and have a single prosecutor on his own December
21 23 somehow make a state trooper, a state serg, a Mass
22 state sergeant, an agent of the federal government, all of
23 that, you know, is, it raises serious issues, and I
24 contend that more discovery is needed regarding to back up
25 the proffers by the government in a memo and I would

1 contest that an evidentiary hearing should be ordered by
2 the Court as to when the federal civil rights
3 investigation if any began. And I say that in the context
4 of a very important memo that is written by the FBI that
5 is appended to my memo that says on, it's written by, by
6 the FBI on January 21 of 15 and it says on page one, "Per
7 an investigation currently being conducted by the
8 Cambridge Police."

9 THE COURT: Right, um-hmmm.

10 MR. WEINBERG: It doesn't say by the Mass state
11 police, doesn't say by an agent of the federal government
12 who's a Mass State Sergeant and it certainly doesn't say
13 FBI and then when you go to page six of that, I think this
14 is a very important document in terms of determining what
15 is the status of the investigation on this critical
16 December 24 date. It says at the very end that there was
17 a meeting on January 7th, two weeks after December 24 with
18 the FBI, the Mass state police, the Middlesex DA, a U.S.
19 Attorney, and AUSA Fisher quote, "Indicated his office
20 would initiate a civil rights investigation." Now that's
21 future language and it makes sense to me that they all
22 have this major meeting on January 7th--

23 THE COURT: Um-hmmm.

24 MR. WEINBERG: --it is a decision that they
25 would initiate, not that they're, not that the U.S.

1 Attorney has initiated.

2 THE COURT: But let me play devil's advocate
3 with you for a second. I mean and you know that sometimes
4 before you get all of human beings in a room to formally
5 agree that they're going to commence an investigation,
6 people have actually been thinking about it and talking
7 about it for some time, so that a statement like that
8 might mean something but it might just mean this is the
9 first time we've all gotten together and put this to paper
10 but in fact we actually started this process some time
11 ago, right? So I mean you're not necessarily arguing that
12 that in and of itself would be dispositive that would just
13 be a factor I imagine.

14 MR. WEINBERG: It's certainly enough to, to
15 warrant an evidentiary hearing and, and I would augment
16 that by talking about the, the idea that between December
17 23 and I'll assume that Mr. Fisher can reject my
18 assumption if he wishes that he was the person Mr. Wyshak
19 referred to. He was the person that got the call on the
20 23rd. He's the person involved on the 7th which we know.

21 THE COURT: Um-hmmm.

22 MR. WEINBERG: And that nothing is done
23 federally between December 23 and January 7th. It's not
24 like there really was a criminal investigation. The FBI,
25 they're not involved as the federal agency that

1 investigates civil rights cases--

2 THE COURT: Um-hmmm.

3 MR. WEINBERG: --until January 21. This memo is
4 an opening memo to the FBI and there's not a single
5 sentence in any of the discovery that indicates that the
6 FBI did anything before the 21st. The U.S. Attorney's
7 Office didn't do anything before the 7th. We have no
8 evidence the Middlesex DA asked the US Attorney to involve
9 themselves before January 7th if indeed they ever did.

10 THE COURT: Um-hmmm.

11 MR. WEINBERG: We have a pending state case in
12 the Cambridge District Court for felonies and
13 misdemeanors. This implicates two very important
14 policies. Your Honor knows the first better than I is the
15 petite policy. The federal government doesn't walk into
16 state, pending state cases as a second sovereign and start
17 federal criminal investigations or federal prosecutions
18 unless there's some compelling reason and I suggest here
19 that the facts of the Feinberg case are utterly lacking in
20 any compelling reason. The only one offered is that this
21 man has a record. In over 15 years on two or three
22 occasions he's made single sentence statements to a
23 stewardess about her son and to another young man in 1999.
24 Fifteen years, three sentences by a guy that's never
25 physically harmed anyone and there's been no weapon, and

1 in this case, and I think it's important when you ask is
2 it really plausible there was a good thing federal, civil
3 rights investigation while a state case was pending, and I
4 should say the state case remains pending and there is no
5 federal prosecution of Ralph Feinberg and there's not been
6 any real federal attention to the Feinberg case
7 independent of Tim Flaherty. But in Central Square with
8 these videos, what happens here and I think it's important
9 is that Mr. Ritaburtri (ph), I'll call him Rita for
10 short--

11 THE COURT: Um-hmmm.

12 MR. WEINBERG: --he was driving a limo in
13 Central Square, he makes a left turn. He goes down a
14 street and stops. His intention is to back up, do a U-
15 turn and head to Harvard Square instead of heading to the
16 Mass Ave. Bridge. Feinberg's car comes behind him.
17 Rita's car backs up. There's a fender bender. Feinberg
18 goes one direction. Rita goes another direction. That's
19 the end of it except Rita gets out of his car. He's a
20 young healthy man. Feinberg is a heavysset fella that
21 never gets out of his car. Rita goes to talk to Feinberg
22 and they exchange words. Feinberg has a cross complaint.
23 He says Rita threatened me. Rita says Feinberg said I'm a
24 Muslim terrorist. That's the end of it. Rita says well
25 Feinberg grabbed my arm. Well, that's fairly implausible

1 in the video. Feinberg drove away. The guy's in the
2 passenger seat. That's the end of it. There's no
3 corroboration. There's no, the video and then there's
4 another witness named Mr. Figaroa. Neither of them and
5 Figaroa's interviewed on February 3rd. The videos are
6 available. None of them make this a federal civil rights
7 case.

8 THE COURT: All right, so on that I actually
9 have read it. I understand, I think I understand your
10 argument intimately. So, but let's circle back into all
11 of this kind of still gets us back to *Fowler*.

12 MR. WEINBERG: Yes.

13 THE COURT: All right, so why does that apply
14 here?

15 MR. WEINBERG: Okay, so here is the exception to
16 *Fowler*. The exception to *Fowler* is when a defendant has
17 in mind a particular individual whom he fears the victim
18 might communicate to the application of the statute is
19 clear. If the person that Mr. Flaherty feared Mr. Rita
20 was going to communicate with was known to Flaherty as a
21 federal officer--

22 THE COURT: Right.

23 MR. WEINBERG: --that would end the *Fowler*
24 analysis.

25 THE COURT: Right.

1 MR. WEINBERG: There's no evidence anywhere at
2 least until May and let me reserve that--

3 THE COURT: Right.

4 MR. WEINBERG: --assuming no evidence in
5 December that Flaherty perceives this to be anything other
6 than Cambridge District Court, not a superior court, a
7 district court case where the accord and satisfactions and
8 a practice of trying to resolve assault cases when there's
9 no serious injury.

10 THE COURT: Um-hmmm.

11 MR. WEINBERG: We're going to give you if, Your
12 Honor, the transcript of December 24th so you can see the
13 words, it's purely, you know, we're going to work out an
14 accord and satisfaction and you're not going to go to
15 court and I'm going to explain to the prosecutor and we're
16 going to resolve this case if you'll accept, accept the
17 money.

18 Second, there's another exception to *Fowler* and
19 that's the Sam Smith one--

20 THE COURT: Right, the first one was the Jim
21 Smith, right?

22 MR. WEINBERG: Yeah, the first one was the Jim
23 Smith one, John Smith--

24 THE COURT: John Smith.

25 MR. WEINBERG: --who is a federal officer and

1 Mr. Flaherty would have to know it and fear it.

2 THE COURT: Right.

3 MR. WEINBERG: The second one is that the
4 communication is that, that Flaherty desires to prevent is
5 to Sam Smith who he doesn't know is a federal officer, but
6 who is one. So let's, let's go back with those two
7 exceptions. The first exception doesn't apply. He
8 certainly doesn't know that Mr. Rita is in communication
9 with John Smith, the federal officer, but Mr. Rita is, who
10 is Mr. Rita in communication with in fact on December 24?
11 He's in communication with the Middlesex District
12 Attorney's Office and he's in communication in, in an
13 implicit way with the Cambridge police as the arresting
14 investigating group, and he's in communication implicitly
15 with the Middlesex Superior Court judge. Now this statute
16 that he's charged with and *Fowler* have nothing to do with
17 judges, nothing to do with state proceedings. We can't
18 imagine by substitute an imaginary federal proceeding
19 against Feinberg that doesn't exist for a real state
20 criminal proceeding. So the idea that Mr. Flaherty can go
21 and say, I don't want you to talk to a state judge, that's
22 not a federal crime under this statute. That would be the
23 *Aguilar* case, a different statute and it wouldn't be the
24 basis to find *Aguilar* cause there's no nexus to a, a
25 potential federal judicial proceeding as to Feinberg. If

1 he said don't talk to the DA, that's outside the statute
2 I would contend. This is a law enforcement officer's
3 statute.

4 And secondly, the District Attorney's Office is
5 not involved in these conversations on December 23 and 4
6 as far as you know from Mr. Merritt's memo and from Mr.
7 Wyshak's affidavit--

8 THE COURT: Um-hmmm.

9 MR. WEINBERG: --sergeant Bullman went outside
10 and around and circumvented the logical prosecutor to talk
11 to regarding a witness tampering issue in a state case.
12 It's one of the reasons I suggest we need either more
13 discovery or an evidentiary hearing because it's utterly
14 implausible that a Mass State Sergeant working every day
15 with the Middlesex District Attorney's Office is going to
16 pick up the phone and call the public corruption unit and
17 ask to speak to Mr. Fisher. Again, I'm making an
18 assumption it was he and not others and say, whoa, we have
19 a witness in a Cambridge District Court case and there is
20 an attempt by Mr. Flaherty to contact him and meet with
21 him, please federalize him. It's just not plausible but
22 if, if it's true, we need a hearing. We need further
23 facts. We need affidavits from Mr. Fisher, Sergeant
24 Bullman. The Middlesex DA's office is completely being
25 circumvented on January 7th. Again, if they did that it

1 would be against petite. It would not meet the
2 certification requirements of 249 which is the ultimate
3 federal civil rights statute that's being proposed and I
4 would suggest, Your Honor, that it would come close to
5 violating the Department of Justice's own manual which
6 requires criminal division supervision. When you're
7 subpoenaing a criminal defense lawyer on a matter that
8 they know will result in his disqualification or conflict
9 with his own client, you need criminal division
10 involvement if you're going to search a lawyer. And I
11 would say that it is not plausible to believe that a man,
12 Mr. Fisher, a man of his experience is unilaterally going
13 to federalize a taping of a criminal defense lawyer
14 knowing that that would end in his or risk his
15 disqualification and a Sixth Amendment representation.
16 That's a serious, serious decision. We don't have a shred
17 of paper as to what happened on this call, not Mr.
18 Bullman's notes, not Mr. Fisher's memo, nothing. We only
19 have a very eloquent memo offered by Mr. Merritt in Mr.
20 Fisher's absence. So I would suggest far more is needed
21 here but let's look at Sergeant Bullman.

22 THE COURT: Um-hmmm.

23 MR. WEINBERG: You know, let's assume that he
24 picked up the phone and knew Mr. Fisher and didn't like
25 the DA, and decided on his own that he was going to, you

1 know, try to walk this case to a different sovereign.
2 The government says well, we effectively deputized him.
3 What does that mean? Does that mean any assisted U.S.
4 attorney can on his own without authorization from the
5 justice department, from Ms. Ortiz, from the FBI which
6 doesn't get involved for four more weeks, make someone a
7 federal agent? An agent of who? He's not an agent of the
8 FBI. They don't start their investigation till the 21st.
9 Does he get agents becoming an assistant U.S. Attorney?
10 Is he hired by the U.S. Attorney? If he went and
11 committed a some offense would the federal government be
12 responsible under the Tort Claim Act? Is he really under
13 the statute authorized to act for the United States? Well
14 18 U.S.C. 1515 does include people authorized to act for
15 the United States but I submit we need an evidentiary
16 hearing. We need far more than the proffer that has been
17 submitted by the United States up to now to make all of
18 these very important judgments.

19 But getting back to *Fowler* on the 24th, may I
20 hand this to you--

21 THE COURT: Yeah.

22 MR. WEINBERG: --and may I ask it to be placed
23 under seal because it's really an unadjudicated electronic
24 surveillance.

25 THE COURT: Okay.

1 MR. WEINBERG: This is a transcript, rough
2 transcript that we prepared and are offering only for the
3 purpose of--

4 THE COURT: Of this hearing. Sure. And I'll
5 note you've provided a copy to the government?

6 MR. WEINBERG: We have.

7 THE COURT: All right.

8 UNIDENTIFIED: This is, the government prepared
9 this.

10 THE COURT: We'll call it Exhibit 1.

11 DEFENDANT'S EXHIBIT NO. 1, ADMITTED

12 MR. WEINBERG: So *Fowler* really deals with the
13 idea of and I'll ask Your Honor, to take a good look at
14 that--

15 THE COURT: Okay.

16 MR. WEINBERG: --because you'll see that it
17 deals with a specific state judicial proceeding and
18 nothing to do with preventing communications to Sam Smith
19 or John Smith.

20 PAUSE

21 THE COURT: Okay.

22 MR. WEINBERG: I'm going to end briefly.
23 *Fowler*, I contend that this is a quint, quintessentially
24 State Court matter on the 23rd and 24th. This tape
25 recording is a quintessentially State Court focused

1 matter. If it's wrong, if it's outside of the accord
2 and satisfaction. It is clearly dealing with resolving a
3 state judicial proceeding with at most the discussion
4 about how the witness should communicate with the state
5 district attorney that yes, theoretically with a single
6 sentence of, of bad language you could theoretically say
7 that this is a civil rights issue. That this is right to
8 what Justice Breyer talked about, which is we have a dual
9 sovereign system and that he used the example of marijuana
10 arrests, that marijuana is both a federal and state crime,
11 that the federal government doesn't go around and create
12 federal criminal investigations with the possession of
13 marijuana, and a very, very small percentage of marijuana
14 arrests are federally. I submit the federal government
15 doesn't go around and create federal civil rights
16 investigations of people like Ralph Feinberg when it's a
17 one-to-one verbal dispute, no injury and no violence to
18 the extent of harm or a weapon's or guns, no official
19 badge, no policeman, no sheriff. It's bad enough they
20 don't create federal civil rights investigations of
21 policemen to go and shoot people much less a fender bender
22 in Central Square, and so you get back to, and this is the
23 issue for Your Honor, I think there's two issues here.
24 *Brady*, we would contest that *Brady* requires the disclosure
25 of any document that memorializes that the purpose of the

1 federal government opening an investigation, whether it
2 was December 24 where we have the first signs of some
3 interest or January 7 where we have an FBI report saying
4 there was a meeting and Mr. Fisher would initiate on
5 January 21 he extended this targeted on Tim Flaherty,
6 supports our proposition that there was no legitimate
7 civil rights or no real possibility Ralph Feinberg was
8 going to be federally prosecuted while a state case was
9 pending, and this was all about federalizing the Tim
10 Flaherty investigation or B, that despite whatever calls
11 occurred between Sergeant Bullman and Mr. Fisher on the
12 23rd and despite whatever was entered in the federal system
13 on the 24th, there was not an ongoing concrete federal
14 criminal investigation until after the taping on December
15 24, and that therefore the 24th must be subject to the
16 *Fowler* test. Was it reasonably likely on February 24 that
17 there was going to be a hard real federal civil rights
18 investigation stash/prosecution and I think there was
19 sufficient of the empirical evidence through the Petite
20 Policy and certification of 249, the answer to that is
21 eloquent and clear, no? In terms of May, we've submitted
22 in writing, Your Honor, why we think in May that this was,
23 and Your Honor may call it an outrageous government
24 conduct where the manufacturing of an element is required
25 as statute, but whatever it is the *Armstrong* case which is

1 what the government points to doesn't exclude our right
2 to discovery. It gives us a right to discovery if there's
3 a showing that discovery can support the selectivity of
4 that prosecution. Here, we have made that showing through
5 the empirical evidence that shows there were 58 cases
6 nationwide in the, in the year 20, I think it's 14, and
7 there's only been one federal civil rights prosecution in
8 this district for three years. So the showing that it was
9 not reasonably likely that there was going to be a federal
10 civil rights prosecution is, has been made just by the
11 empirical evidence and--

12 THE COURT: But my guess is you'd argue that if
13 the stats showed a lot of civil rights prosecutions that
14 those don't necessarily effect how we should be viewing
15 the facts of this case.

16 MR. WEINBERG: I would concede that if there was
17 a regularly prosecuting people on the uncorroborated claim
18 of the verbal dispute as there was in Central Square here,
19 that my argument that it was not substantially likely
20 there was going to be a civil rights prosecution would be
21 deeply dampened--

22 THE COURT: Um-hmmm.

23 MR. WEINBERG: --but those facts are, are
24 contrary to
25 a year after year record.

1 THE COURT: And you consistently use the term
2 prosecution, but aren't investigations that don't
3 necessarily result in prosecutions a large part of the
4 picture for DOJ and, therefore, aren't the stats that
5 you're referring to somewhat skewed because those reflect
6 only those cases where somebody determined that we have
7 enough evidence to prove it beyond a reasonable doubt.

8 MR. WEINBERG: Absolutely, Your Honor, and, and
9 that, but the, the stats gets me in the door to satisfy
10 the *Armstrong* standard, and Your Honor has put your finger
11 on exactly why we need Your Honor to grant the discovery
12 request because we don't have, how many cases do the FBI
13 investigate. Of those cases, how many were pending state
14 cases? Of those cases, how many had no physical injury?
15 In other words, is it reasonably likely that independent
16 of Tim Flaherty's efforts to resolve the state case that
17 the FBI was going to join the Mass state police and they
18 were both going to join the Cambridge police. By the way,
19 there's no evidence the Mass state police did anything
20 here except conduct tape recordings of Mr. Flaherty, but
21 Your Honor has put your finger on why this is important
22 evidence that, you know, we've, we've established that
23 there's one prosecution in three years. Is it really
24 going to be Ralph Feinberg for saying a single sentence, a
25 one-to-one dispute that's being prosecuted equally by a

1 very tough District Attorney's Office and if the answer
2 is probably not then we have satisfied, I contest that
3 threshold that *Armstrong* requires for our receiving the
4 kind of evidence where we can prove to Your Honor that
5 just like the prosecutions don't occur, the FBI doesn't
6 get involved in these kind of cases.

7 THE COURT: Okay. All right. Thank you.
8 Anybody from the government wish to be heard?

9 MR. MERRITT: Well, Your Honor, I, I think, you
10 know, most of the arguments, it's really what was in their
11 favors and it all goes back to, to the fact that *Fallor*
12 deals with hypotheticals.

13 THE COURT: Um-hmmm.

14 MR. MERRITT: This was not a hypothetical
15 communication and we don't need an evidentiary hearing for
16 purposes of the discovery motions. If the Court accepts
17 and there's no, been no reason not to accept the affidavit
18 of Mr. Wyshak, that an investigation of both offenses was
19 opened on 23rd, based on information on the 23rd and, and
20 was in play on the 24th.

21 THE COURT: Okay, so let me ask you a question
22 about that. Assume for the sake of argument I want to
23 accept all of the representations of the government, so
24 the Wyshak affidavit, everything that's in the governments
25 memoranda and I do, assume for the sake of argument it's

1 true, but at the same time you've got a defendant who
2 was saying, but I'm out here in the dark screaming that
3 what they're saying smells bad. It's just not plausible.
4 It just doesn't work. As a matter of law, are they, is
5 the answer sorry, you can be suspicious of our
6 representations. You can continue to think it's just not
7 plausible. We might initiate an investigation for an
8 incident like this at this juncture but that doesn't give
9 you a basis to force us to open our door and to open the
10 curtain so you can peer behind, or does that sometimes, I
11 mean there comes a point when the Court can say, yeah,
12 just, it just seems so outlandish that that in and of
13 itself should make this an exceptional circumstance
14 warranting further discovery.

15 MR. MERRITT: Well I, I think that there could
16 be situations, but for purposes of the discovery motions
17 at this point--

18 THE COURT: Right.

19 MR. MERRITT: --if the Court accepts as true the
20 fact that a case was opened by the U.S. Attorney's Office
21 on those offenses then I would suggest that all their
22 other arguments just don't matter because now the argument
23 is well, wait a second. Yes, all right, we'll concede
24 they, they did open the investigation but we claim that it
25 was subterfuge, that they really didn't care about that

1 civil rights claim, and the fact of the matter is this
2 is now this kind of manufactured jurisdiction argument
3 which is, is basically never really succeeded except in
4 that one case in Archer as far as I can tell, and in fact
5 when it was raised before Judge Wolf in the *Jokich* (ph)
6 case, the court found that the mere fact that the
7 government caused and intended to cause a federal crime to
8 be committed where only a local or foreign crime might
9 otherwise have existed is not outrageous misconduct. So
10 even if, even if you were to credit their kind of spurious
11 allegation that the government opened up an investigation,
12 perhaps not really thinking that it was going to end up in
13 a prosecution, that would not rise to the level of
14 outrageous government misconduct that would otherwise now
15 justify the kind of wholesale and intrusive discovery that
16 they're requesting which also, I would submit, Your Honor,
17 is prohibited by Rule 16(a)(2) which deals with internal
18 memorandum made by government attorneys and agents about
19 an investigation or a case. So, you know, their arguments
20 keep, you know, sort of depend on each other but I think
21 both of them don't hold weight.

22 THE COURT: Okay.

23 MR. MERRITT: The other point which I think
24 keeps getting lost is that they, they seem to be
25 suggesting at different times that, you know, it, it

1 wasn't reasonable or plausible to Mr. Flaherty that such
2 an incident could be investigated by federal authorities,
3 and of course that is completely irrelevant under any of
4 these cases cause it's not about his intent. It's clear
5 that the law has never changed, that he does not to have,
6 does not have to have a state of mind as to whether or not
7 it is a federal or a state officer who communication he's
8 trying to prevent. So you know, again that's not a
9 particularly cogent factor in this case.

10 THE COURT: Okay.

11 MR. MERRITT: So, I, I think that the Court has
12 a sufficient basis to find A, that *Fowler* doesn't apply
13 and therefore, 90% of what they're asking for is really
14 not warranted.

15 THE COURT: Okay.

16 MR. WEINBERG: If I could just take a minute to
17 reply. First of all, this is not just generic government
18 work product.

19 THE COURT: Um-hmmm.

20 MR. WEINBERG: Briefs filed by Mr. Merritt,
21 focus on December 23 and 4 by then their anti-*Fowler*
22 argument that there was a federal criminal investigation
23 where it made factual assertions, and just like Mr. Wyshak
24 can file an affidavit to support them, the Court certainly
25 has the discretions to inquire that Mr. Fisher, Sergeant

1 Bullman file, that Bullman has notes. He is made as a
2 member of the prosecution team. Again, I ask that if they
3 are members of the prosecution team, then the Mass state
4 police are not protected by attorney work product that
5 they should be required to provide their documents, their
6 notes, their memos.

7 Similarly when the government says we have
8 authorized someone to be a federal agent, where's the
9 authorization? Mr. Wyshak doesn't address that. The
10 government says effectively authorized. When they say we
11 approved the taping of the criminal defense lawyer, where,
12 it should, right now it's just air. It's, it's a, a memo
13 of law that makes factual assertions that Your Honor has
14 every right as a magistrate judge to require a
15 particularized backed up in discovery he provided.
16 They're fact witnesses doing essential element of a
17 federal criminal charge against a criminal defense lawyer,
18 that being that as Mr. Merritt says, you don't have to
19 intend to be communicating to a federal officer, but has
20 to be reasonably likely he prevented that communication
21 because a phone call was made on December 23 and somebody
22 types something into a system does not initiate a federal
23 criminal investigation. That investigation was not
24 initiated. Nothing happened. Nothing was done. The, the
25 date that the FBI which is the only party that's within

1 the statute, this is a law enforcement statute repeating
2 communications to law enforcement, they didn't have their
3 first involvement open on the case file until four weeks
4 later, so that's *Fowler*. Was it reasonably likely on
5 December 23 that the feds would get involved?

6 THE COURT: Okay.

7 MR. WEINBERG: And that simply having a phone
8 call from Bullman to Fischer on the 23rd does not magically
9 transform a Cambridge District Court/Middlesex DA's case
10 into a federal criminal investigation.

11 Thank you very much, Your Honor.

12 THE COURT: Thank you. All right, I think with
13 the benefit of that we can go back and wade through this.
14 As I indicated at the outset my schedule's going to be a
15 little sporadic over the next couple of weeks. So
16 hopefully by the early part of September we can resolve
17 these, and just for the record, there are three
18 outstanding motions that I see, motion requiring the
19 government to produce the DOJ material, motion to strike
20 and then a supplemental motion for discovery, filed most
21 recently by the defense. Are those?

22 MR. BUTTERS: Yeah, they are and my motion to
23 strike maybe moot now since we've caught up with the
24 timing. I, when the motion was based on the fact it was a
25 bit premature under the local rules so--

1 THE COURT: Okay.

2 MR. BUTTERS: --that may be moot.

3 THE COURT: All right.

4 MR. FISHER: I, I think the first motion is kind
5 of subsumed by their supplement.

6 MR. WEINBERG: We, we reincorp, we both I
7 think--

8 THE COURT: Okay.

9 MR. WEINBERG: --reincorporated explicitly and--

10 THE COURT: All right. So we'll make it clear
11 that when we deal with that and the first two are pretty
12 much subordinate to the most recent one so.

13 All right, is there anything else that we need
14 to address, and I know that's this is the big issue and
15 we'll get to it as quickly as we can, but otherwise is
16 there anything else we need to address today?

17 MR. FISHER: Other than excluding time, Your
18 Honor, no. I did, I did file the, the interim status
19 report.

20 THE COURT: Yeah, I mean yeah, and the motions
21 are pending so--

22 MR. FISHER: Sure.

23 THE COURT: --I the clock has tolled so, all
24 right.

25 COUNSEL: Thank you, Your Honor.

1 THE COURT: All right, thank you everybody.

2 (Court adjourned)

3 (10:59:00 AM

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CERTIFICATION

I, Maryann V. Young, court approved transcriber,
certify that the foregoing is a correct transcript from
the official digital sound recording of the proceedings in
the above-entitled matter.

/s/ Maryann V. Young

April 27, 2016

MARYANN V. YOUNG
Certified Court Transcriber
(508) 384-2003